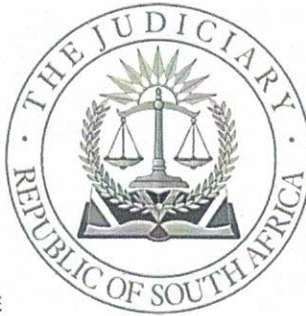




DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~NO~~ YES
(2) OF INTEREST TO OTHERS JUDGES: NO/YES
(3) REVISED: NO/YES

11/6/2019 *Am Mung*

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 52901/2018

ELSA RAUCH

Applicant

and

PIXIE DUST TRADING 134 (PTY) LTD

Respondent

In Re: Eviction Application between:

PIXIE DUST TRADING 134 (PTY) LTD

Applicant

and

ELSA RAUCH

First Respondent

THE CITY OF TSHWANE MUNICIPALITY

Second Respondent

RUDI RAUCH

Third Respondent

TONI RAUCH

Fourth Respondent

JUDGMENT

SM MARITZ, AJ

Introduction

- [1] The Applicant seeks an order in terms of Rule 30(1) of the Uniform Rules of Court that the Respondent's irregular step in respect of its Notice of Motion to the eviction application by setting the eviction application down for 12 September 2018 and directing the Applicant to file an Answering Affidavit by 4 September 2018 be set aside. The Applicant, in the application in terms of Rule 30(1), is the First Respondent in an application for eviction instituted by the Respondent. I will henceforth refer to the parties respectively as in the application in terms of Rule 30(1), the Applicant, being Elsa Rauch ("Rauch or Applicant"), and the Respondent, being Pixie Dust Trading 134 (Pty) Ltd ("Pixie Dust or Respondent"). The matter came before me for adjudication on 29 April 2019 and the judgment was then reserved.

Relief sought

- [2] The Applicant seeks the following relief in her Notice of Motion, dated 28 August 2018, in support of her application in terms of Rule 30:
1. That the Applicant's (Respondent in this application) irregular step in respect of the Notice of Motion by setting the main application down for 12 September 2018 and directing the First Respondent (Applicant in this application) to file an Answering Affidavit in the main application by 4 September 2018, be set aside, which irregular step is detailed in the

- [4] The Respondent seeks the eviction of the Applicant from the property based thereon that it is the registered owner of the property. The property allegedly previously belonged to the Applicant's ex-husband prior to divorce of which she obtained partial ownership of the property as she was awarded a third of the estate of her ex-husband at the time in subsequence of the divorce action. She was supposed to purchase the property outright, but for various reasons it could not be effected. The Director of the Respondent, Mr Derick Knoll, who the Applicant alleges always had displayed romantic feelings towards her, offered to purchase the property on her behalf from her ex-husband, until such time that she was able to purchase the property from him personally or from his company, being the Respondent. It is further stated in the Applicant's Founding and Replying Affidavits that she has been in control and occupation of the property since at least 1994, therefore for the preceding 24 years. In paragraph 7.4.3 of the Applicant's Replying Affidavit she stated that she has been residing in the property since 1994 where she, *inter alia*, raised her two children, which are cited as the Third and Fourth Respondents in the eviction application and who is currently not residing with her anymore. During July 2015 the Respondent's then attorney of record wrote two letters of demand to the Applicant demanding that she entered into a written agreement of lease, failure to do so will result in eviction proceedings being instituted against her. Copies of these letters are attached to the Applicant's Founding Affidavit, marked as Annexures "11" and "12", respectively. The Applicant has refused to entered into a lease agreement with the Respondent and this resulted in the current eviction application instituted against her.

- [5] Although a copy of the eviction application is attached to the Applicant's Founding Affidavit, marked as Annexure "I5", it is not before me for adjudication.
- [6] There is no contention that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, is not applicable ("the PIE Act").
- [7] The chronological sequence of events, which led to this application are briefly as follows:
- The eviction application was issued on 26 July 2018 and served per Sheriff on the Applicant on 6 August 2018.
 - The eviction application was enrolled on the unopposed motion roll for hearing on 12 September 2018. The date of the hearing was determined by the Respondent in his Notice of Motion to which the eviction application is attached.
 - The Applicant served her Notice of Removal of Cause of Complaint in terms of Rule 30(1) on the Respondent's attorney of record on 13 August 2018. The relevant part of the Notice of Removal of the Cause of Complaint reads as follows:

"1. The Applicant (Respondent in this application) intends to bring this application on the 12th day of September 2018, which application was issued on the 26th day of July 2018 and served on the 1st Respondent (Applicant if this application), by way of the Sheriff, on the 6th day of August 2018.

2. *Accordingly to the application, the 1st Respondent (Applicant in this application) may serve its notice of intention to oppose on or before the 14th day of August 2018 and thereafter serve its answering affidavit on or before the 4th day of September 2018.*
3. *After the process above, the applicant (Respondent in this application) must apply to the court on an Ex parte basis, after litis contestation, in order to receive authorisation to serve a Section 4(2) notice in terms of the PIE Act. In terms of Section 4(2) of the PIE Act, such effective notice must be served on the alleged unlawful occupier at least 14 (fourteen) days before the hearing of the proceedings.*
4. *The 1st Respondent (Applicant in this application) has not been allowed adequate time to oppose this matter, and may still oppose this matter, if the respondent (Applicant in this application) so wishes, on or before the 14th August 2018 where after the respondent (Applicant in this application) may deliver its answering affidavit in accordance with the Rules of Court.*
5. *The Applicant may only approach the Honourable Court on an Ex parte basis after expiry of the time for opposition, or after the Respondent (Applicant in this application) has duly answered within the time allowed for delivery of such answering affidavit.*
6. *Accordingly, the Applicant (Respondent in this application) has not complied with the Rules of Court by having the matter enrolled for the 12th day of September 2018, and the non-compliance thereof constitutes an irregular step.*
7. *Further, the Applicant (Respondent in this application) has not complied with Section 4(2) of the PIE Act, as the service of a notice in terms of Section 4(2) must be made at least 14 (fourteen) days before hearing and as directed by the Court after an Ex parte*

application. As such, the Applicant (Respondent in this application) has not adhered to Section 4(2) of the PIE Act, nor according to the Rules of Court, as the 1st Respondent (Applicant in this application) may still oppose this matter, thereafter deliver an answering affidavit. Only after last mentioned may the Applicant serve a Section 4(2) notice, after authorisation was received on an Ex parte basis, with at least 14 (fourteen) days remaining before hearing of the matter."

- The Applicant served a Notice of Intention to Oppose the eviction application on 14 August 2018, in order to prevent the Respondent from obtaining judgment against her in the eviction application on an unopposed basis as well as to protect and safeguard her interests in the eviction application. It was contended on behalf of the Applicant that the Notice of Intention to Oppose served on 14 August 2018, was only a provisional Notice of Intention to Oppose.
- The relevant part of the Respondent's Notice of Motion : Eviction Application is as follows:

"TAKE NOTICE THAT the abovementioned Applicant, **PIXIE DUST TRADING 134 (PTY) LTD**, intends to make application on **12 SEPTEMBER 2018** alternatively as soon thereafter as counsel for the Applicant may be heard in this court, for an order in the following terms:

1. The First Respondent and any person occupying through the First Respondent, the property known as **PORTION 12 OF ERF 3051 FAERIE GLEN EXTENSION 11**, situated at 4 Grassridge, Valley Farm Villas, Cliffendale Avenue, Faerie

Glen, is hereby directed and ordered to vacate the property ("eviction").

2. *The eviction as set out above, shall take place within thirty (30) calendar days after the granting of this order.*
3. ...
4. ...
5. ...
6. ...

FURTHER TAKE NOTICE THAT...

FURTHER TAKE NOTICE THAT...

FURTHER TAKE NOTICE THAT *if you intend opposing this application, you are required to:*

- (a) *Notify the Applicant's (Respondent in this application) attorney in writing on or before the expiry of the 5th day after service of this application on you;*
- (b) *within 15 days after such notice has been delivered, deliver your answering affidavit, if any; and..."*

- The 15 days referred to in the abovementioned Notice of Motion expired on 4 September 2018, by which date the Applicant (Respondent in eviction application) should have filed her Answering Affidavit.
- On 15 August 2018 the Respondent's attorney of record wrote a letter (Annexure "I3" attached to the Applicant's Founding Affidavit) to the Applicant's attorney of record, the relevant part thereof is as follows:

- "1. ...*
- 2. We note the contents of your client's notice in terms of Rule 30(1) served on our offices on 13 August 2018 as well as your client's Notice of her Intention to Oppose the Eviction Application, served on our offices on 14 August 2018.*
- 3. We hereby reiterate our undertaking in terms of paragraph 10.8 of our client's Founding Affidavit that section 4(2) of the PIE Act will be complied with prior to seeking an order for your client's eviction.*
- 4. In light of your client's Notice of Intention to Oppose and in line with the SCA judgment in Cape Killarney 2001 (4) SA 1222, naturally our client will only be able to pursue an ex-parte section 4(2) Application once the High Court's Registrar has allocated a date for hearing on the opposed roll. To this end, we confirm that your client's Answering Affidavit is due on/or before 4 September 2018.*
- 5. With regard to your client's Notice in terms of Rule 30(1), we place the following on record:*
 - Our client has complied with the Uniform Rules of Court, and your client's view to the contrary, is fundamentally misconceived.*
 - Your client's procedural benefit in terms of section 4(2) of PIE has always been and remains intact.*
 - Over and above the aforementioned, your client has not pointed to any prejudice nor can any possible prejudice be gleaned from the allegations made in the Rule 30(1) notice.*
- 6. In the circumstances, we invite you to withdraw your client's Rule 30(1) notice and tender the wasted costs occasioned by the flawed notice on/or before close of business on Friday 17 August*

2018, failing which, we hereby inform of our client's intention to oppose any Application in terms of Rule 30(1). To this end we inform that our client will seek an appropriate attorney and client scale costs order should your client persist with her unfounded complaint in terms of Rule 30(1)."

- On 20 August 2018 the Applicant's (First Respondent in eviction application) attorney of record replied in a letter (Annexure "I4" attached to the Applicant's Founding Affidavit) to the abovementioned letter of the Respondent's attorney of record. The relevant part thereof is as follows:

" ...

We fundamentally differ from you regarding the process that you have adopted. We are not going to accept your invitation to withdraw the Rule 30(1) notice served on your offices on the 13th of August 2018...

When the ten days referred to in the Court Rules have expired, we will proceed with an application in terms of Rule 30(1). Obviously, the service and filing of an opposing affidavit will be held in abeyance until such time as the Court has ruled on our Rule 30(1) application.

... "

- On 28 August 2018 the Applicant served her application in terms of Rule 30 on the Respondent's attorney of record.
- On 28 August 2018 the Respondent's attorney of record served a Notice of Intention to Oppose the Applicant's application in terms of Rule 30.

- On 18 September 2018 the Respondent served its Answering Affidavit in terms of the Rule 30 application on the Applicant's attorney of record.
- The Applicant served her Replying Affidavit in terms of the Rule 30 application on the Respondent's attorney of record on 3 October 2018.

Legal framework in respect of Rule 30

[8] Rule 30 of the Uniform Rules of Court reads as follows:

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-
 1. (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
 2. (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
 3. (c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it

aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it deems fit.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

(5) ...

[9] It is important to state that an application in terms of Rule 30 will be granted only where the irregular step would cause prejudice to the Applicant seeking to set it aside. See : *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 276F-H; *SA Metropolitan Lewensversekeringmaatskappy Bpk v Louw* NO 1981 (4) SA 329 (O) at 333D-F; *De Klerk v De Klerk* 1986 (4) SA 424 (W) at 426F-427B; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabriek GmbH* 1991 (1) SA 823 (T) at 824G-H and *Sasol Industries (Pty) Ltd t/a Electrical Repair Engineering)Pty) Ltd t/a LH Marthinusen* 1992 (1) SA 466 (W) at 469G. The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not

set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step and the irregular step can simply be ignored.

Argument

- [10] Mr Duvenhage on behalf of the Respondent raised 2 points *in limine* in argument as well as in the Respondent's Answering Affidavit in respect of the Applicant's application in terms of Rule 30. Although I will briefly state the points *in limine* I do not intend to rule on them separately, but will deal with the application in its totality.
- [11] The first point *in limine* raised by the Respondent is that the Applicant has failed to allege or showcase any procedural prejudice. He contended that there must have been a litigious step by an opposing litigant which can be considered 'irregular' either in terms of the rules of court or otherwise and the 'irregular step' must have caused, or will cause, actual procedural prejudice for the complaining litigant, if required to continue with the litigation.
- [12] The crux of Mr Duvenhage's argument was that the Applicant has failed to even mention the word 'prejudice' in her Founding Affidavit and further that the Applicant has failed to showcase any procedural prejudice, particularly considering the following:
- (a) The timing of a litigant in pursuing an *Ex-parte* section 4(2) application, depends entirely, on whether an unlawful occupier gives notice of her intention to oppose the eviction application or not;

- (b) It is common cause that the Applicant filed a Notice of Intention to Oppose the main eviction application on 14 August 2018;
- (c) The effect of the Applicant's Notice of Intention to Oppose is that the Respondent can now only launch and pursue an *Ex parte* application, once the court's registrar has allocated a date for the hearing of this matter on the opposed motion roll and as a result thereof the matter should be ripe for hearing and all pleading (Founding, Answering and Replying Affidavits plus heads of argument) should be filed.

[13] In paragraphs 13 and 14 of Mr Duvenhage's heads of argument he stated that, had the Applicant not been represented by attorneys of record and had she not filed a Notice of Intention to Oppose the main eviction application, then and only in that event, the Respondent would have theoretically been precluded from seeking an eviction order in terms of its Notice of Motion on 12 September 2018. Furthermore, Mr Duvenhage conceded that had the matter been unopposed, the Respondent would have had to postpone the eviction application on 12 September 2018 to a further date, in order to make provision for enough time to launch, authorise and serve a section 4(2) notice on the Applicant.

[14] Mr Duvenhage further stated in paragraph 16 of his heads of argument and in argument he conceded that the only error the Respondent made, is that its Notice of Motion, should have indicated a date for hearing on the unopposed motion roll, further along in advance, to allow the Respondent time to approach this court on an *Ex parte* basis after having served its main eviction application and after the applicant, theoretically, not having delivered a Notice of Intention to Oppose. I agree with this contention.

- [15] Mr de Beer on behalf of the Applicant contended that by determining the date for the hearing of the eviction application as 12 September 2018 and enrolling the matter on the unopposed motion roll, the Respondent, as a consequence of the process adopted by it, was obliged to comply with section 4(2) of the PIE Act prior to the hearing on 12 September 2018. Furthermore, by directing the Applicant to file her Answering Affidavit within 15 days from the date of delivering her Notice of Intention to Oppose, as stated by the Respondent in its Notice of Motion in the eviction application, on 4 September 2018, which could not have been effected prior to compliance with section 4(2) of the PIE Act, which should have been done at least 14 days prior to 12 September 2018, would be severally prejudicial to the Applicant as she will have less notice and substantially less time to put her case before court than is the case with Respondents in ordinary motion proceedings and that will render the provisions of section 4(3) and section 4(4) of the PIE Act meaningless. He further stated that the provisions of section 4(2) of the PIE Act is peremptory and that the notice in terms of section 4(2) of the PIE Act is in addition to and not a substitute for the notice required by Court Rule 6. It appears from the Applicant's Notice of Removal of Complaint that it is the case of the Applicant that the Respondent's irregularity pertains to the fact that the Respondent did not allow sufficient time prior to 12 September 2018 for the filing of the affidavits and to comply with the section 4(2) notice.
- [16] Mr de Beer further contended that the Applicant will be severely prejudiced if the Respondent is successful in its eviction application despite following due process. He pointed out that the Applicant has been residing in the said property since 1994, approximately 24 years, that it is

her primary dwelling, that she is the head of her household and that she has raised her two children there.

[17] I agree with Mr de Beer that the Applicant will be severely prejudiced if it is found that the Respondent is successful in its eviction application despite following due process, but I do not agree that there was an 'irregular step' which caused actual procedural prejudice for the Applicant, if required to continue with the litigation, as will be set out hereinunder.

[18] I do not think it is necessary to rule on this point separately. I will deal with the application in its totality.

[19] Mr Duvenhage raised a second point in limine that Rule 30 is not the correct procedure to follow if non-compliance with a statutory provision is alleged. It is trite that Rule 30 is not intended to serve as a basis for an objection to procedural irregularities in respect of legislation. The correct procedure is either to object by delivering a special plea or to raise a point in limine.

[20] Mr Duvenhage pointed out that the crux of the Applicant's application is set out in paragraph 13.7 of her Founding Affidavit where it is stated as follows:

"13.7 This interlocutory application is specifically based on Section 4, read with subsection (2) of Act 19 of 1998, the legislation referred to as "the PIE Act" (with reference to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act), which the Applicant has erroneously interpreted."

- [21] Mr de Beer argued that the basis of the Applicant's complaint is against the irregular procedure followed by the Respondent to direct the Applicant to comply with the time periods stipulated in its Notice of Motion in the eviction application to deliver an Answering Affidavit on 4 September 2018, which cannot be effected prior to compliance with section 4(2) of the PIE Act. As I understand Mr de Beer correct the objection is not against the non-compliance with the provisions of section 4(2) of the PIE Act, but rather against the fact that the Respondent demanded delivery of an Answering affidavit in compliance with the time periods as stipulated in its Notice of Motion to the eviction application. It was further the case of Mr de Beer on behalf of the Applicant that the time periods for filing an Answering Affidavit will only commence once there was compliance with section 4(2) of the PIE Act and as such any request prior to that to deliver an Answering Affidavit in terms of the time periods stipulated in the Notice of Motion to the eviction application is premature and constitutes an irregular step. The basis of the Applicant's complaint is further evident from the relief sought in her Notice of Motion in the application in terms of Rule 30.
- [22] Although I agree with Mr Duvenhage that Rule 30 is not the correct procedure to follow if non-compliance with a statutory provision is alleged, I am not going to rule on this issue separately, as I was requested by both parties to interpret the provisions of section 4(2) of the PIE Act with specific reference to the Practice Manual of this division of the High Court and as such I will deal with the matter in its totality.
- [23] Mr Duvenhage on behalf of the Respondent referred to *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2001 (4) SA 1222 (SCA)* ("Cape Killarney judgment"), and more specifically paragraph [14]

thereof, as authority to direct the Applicant to file her Answering Affidavit on 4 September 2014, and as authority that only once all the papers on both sides have been served, the Respondent should comply with the provisions of section 4(2) of the PIE Act. I will address this point hereinunder.

Legal Framework in respect of section 4 of the PIE Act and the Practice Manual

- [24] In the Cape Killarney judgment the Supreme Court of Appeal prescribed the procedure to be followed by an Applicant in proceedings for the eviction of unlawful occupiers.
- [25] The provisions of section 4 of the PIE Act are peremptory. (See *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2001 (4) SA 1222 SCA at [11] and [17]*; *Sam Kadish Moela v Tichaona Abel Shoniwe- case number 54/2004 (SCA) (unreported) at [7]*).
- [26] The Supreme Court of Appeal in the Cape Killarney judgment held that the 14-day notice period provided for in section 4(2) of the PIE Act must be given in addition to the normal notice given to a Respondent in terms of Rule 6 of the Uniform Rules of Court. If that was not the case it will render sections 4(3) and 4(4) of the PIE Act meaningless. It accordingly follows that where a person is to be evicted from his/her residence he/she is afforded a greater opportunity in preparing his/her defence(s) or formulating his/her submissions than he/she would have under the Rules to put all the circumstances that he/she alleges to be relevant before the court. (*Cape Killarney judgment at [12] and [20]*). Furthermore, given that the PIE Act has its roots in, *inter alia*, section 26(3) of the Constitution of the Republic of South Africa, 108 of 1996, the purpose of section 4(2)

clearly is to afford respondents in eviction proceedings under the PIE Act a better opportunity than they would otherwise have had under the Rules of the court concerned to put all the circumstances they allege to be relevant before the Court. (*Cape Killarney judgment at [20]*).

[27] In paragraph [14] of the *Cape Killarney* judgment the Honourable Mr Justice Brand AJA held as follows:

“[14] Section 4(5)(b) requires the s 4(2) notice to indicate the date upon which the court will hear the eviction proceedings. In High Court proceedings by way of application this date of hearing will be determined only after all the papers on both sides have been served. It follows, in my view, that it is only at that stage that the s 4(2) notice can be authorised and directed by the Court. From the judgment of the learned Judge a quo (at 761I-J) it appears that according to his understanding of s 4(2) the notice contemplated by that section is to precede service of the notice of motion in terms of the Rules and that in fact the minimum period of 14 days stipulated in the section is to elapse before the eviction proceedings can be instituted. As appears from what I have already said, this interpretation cannot be supported.” [Own emphasis]

[28] The provisions of section 4 of the PIE Act, which are of particular relevance to this matter are the following:

“4. EVICTION OF UNLAWFUL OCCUPIERS –

- (1) *Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by any owner or person in charge of land for the eviction of an unlawful occupier.*
- (2) *At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the Municipality having jurisdiction.*
- (3) *Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.*
- (4) *Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.*
- (5) *The notice of proceedings contemplated in subsection (2) must-*
 - (a) *State the proceedings are being instituted in terms of sub-section (1) for an order for the eviction of the unlawful occupier;*
 - (b) *Indicate on what date and at what time the Court will hear the proceedings;*
 - (c) *set out the grounds for the proposed eviction; and state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."*

[29] The Chapter 15 of the Practice Manual reads as follows:

“15.10 EVICTION WHERE THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT 19 OF 1998 APPLIES

1. *The application for eviction must be a separate application. The procedure to be adopted (except in urgent applications) is as follows:*
 - 1.1 *The notice of motion must follow Form 2(a).*
 - 1.2 *The notice of motion must give a date when the application will be heard in the absence of a notice of intention to oppose.*
2. *After the eviction application has been served and no notice of intention to oppose has been delivered, or if a notice of intention to oppose has been delivered at a stage when a date for the hearing of the application has been determined, the applicant may bring an ex parte interlocutory application authorising a section 4(2) notice and for directions on service.*
3. *When determining a date for the hearing of an eviction application, sufficient time must be allowed for bringing the ex parte application, for serving the section 4(2) notice and for the 14 day notice period to expire.*

4. *If the eviction application is postponed in open court on a day of which notice in terms of section 4(2) was duly given, and if the postponement is to a specific date, it will not be necessary to serve another section 4(2) notice in respect of the latter date.*
5. *The local, provincial or national authorities that may be affected by an eviction order must be clearly identified."*

[30] The relevant part of Chapter 13 of the Practice Manual read as follows:

"13.9 ENROLMENT

1. Unopposed motions

2. Opposed motions

- 2.1 *A party to an opposed motion may apply to the registrar to allocate a date for the hearing of that application in terms of rule 6(5)(f) of the Uniform Rules of Court only, if, in addition:*
- (a) The papers have been indexed and paginated; and*
 - (b) The heads of argument have been served and filed."*

Conclusion

[31] The Respondent issued a Notice of Motion in the eviction application, which complied with Form 2(a). In the Notice of Motion a period of not less than five days from the date of service of the eviction application was allowed to deliver a Notice of Intention to Oppose. The Respondent has determined a date for the hearing of the eviction application in the

absence of the filing of a Notice of Intention to Oppose. The date determined for the hearing was 12 September 2018. The Respondent duly complied with paragraphs 1.1, 1.2 and 1.3 of Chapter 15 of the Practice Manual. The Applicant has served a Notice of Intention to Oppose on 14 August 2018.

[32] The paragraph 2 of the Practice Manual reads as follows:

“After the eviction application has been served and no notice of intention to oppose has been delivered or if a notice of intention to oppose has been delivered at a stage when a date for the hearing of the application has been determined, the applicant may bring an ex parte interlocutory application authorizing a section 4(2) notice and for directions on service.”

[33] In this application a date for the hearing has been determined, being 12 September 2018, in the absence of a Notice of Intention to Oppose been delivered. The Applicant has served a Notice of Intention to Oppose on 14 August 2018. The date determined for the hearing in the Notice of Motion to the eviction application, being 12 September 2018, is only relevant, if the eviction application has not been opposed. Only in the event that no Notice of Intention to Oppose was delivered, the Respondent should have been obliged to comply with the section 4(2) notice at least 14 days prior to 12 September 2018.

[34] It is important to note that the Practice Manual does not specifically state that all the papers should be served once a Notice of Intention to Oppose has been delivered. It only states : *“if a notice of intention to oppose has been delivered at a stage when a date for the hearing of the application*

[38] It follows that once the application is ripe for hearing and a date for the hearing on the opposed motion roll has been determined, sufficient time must be allowed for bringing the *Ex parte* application, for serving the section 4(2) notice and for the 14 day notice period to expire. As such the notice in terms of section 4(2) is in addition to the notice required by Court Rule 6 and in compliance with sections 4(2), 4(3) and 4(4) of the PIE Act.

[39] I found that the Respondent complied with the directives of the Practice Manual as well as with what is stated in the Cape Killarney judgment and the procedure adopted by the Respondent does not constitute an irregular step.

[40] As a result, the Applicant's application should be dismissed.

Costs

[41] Upon consideration of the circumstances and facts of this interlocutory application I exercise my discretion in respect of costs and make an order as set out below.

Order

[42] An order is made in the following terms:

1. The Application is dismissed;
2. The Applicant (First Respondent in the eviction application) is ordered to deliver her Answering Affidavit within 15 (fifteen) days from date of this order; and

3. The Applicant (First Respondent in the eviction application) is ordered to pay the costs of this application on a party and party scale.

BY ORDER



SM MARITZ AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for Applicant:	Adv J de Beer
Applicant's Instructing Attorney:	Couzyn Hertzog & Horak Inc.
Counsel for Respondent:	Adv A Duvenhage
Respondent's Instructing Attorney:	Natalie Visagie Inc.